NO. 41875-4-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

REED BOYSEN,

Defendant-Appellant.

APPELLANT'S OPENING BRIEF

Appeal from the Thurston County Superior Court
The Hon. Carol Murphy, Superior Court Judge
No. 10-1-01650-7

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2. Mr. Boysen was denied his federal and state constitutional rights to confront the witnesses against him when the trial court granted the State's motion *in limine* to curtail the cross-examination of its key witness, Chad Parker.

3. The prosecutor committed flagrant and ill-intentioned misconduct when he improperly vouched for Chad Parker's credibility.

4. Trial counsel was constitutionally ineffective in failing to object to prosecutorial misconduct.

5. The trial court abused its discretion when it excused Juror No. 26 for cause, thereby violating Boysen's federal and state constitutional rights to an impartial jury.

6. The convictions for second degree assault and drive-by shooting violate double jeopardy.

7. The trial court erred when it rejected the defense contention that for sentencing purposes the drive-by shooting constituted the same criminal conduct as the two second degree assault charges.

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Procedural Overview

Reed Boysen was charged by information with two counts of second degree assault, both with deadly weapon enhancements, and one count of drive-by shooting, based on a "road rage" incident which occurred on October 31, 2010. CP 35-36.

Boysen proceeded to trial, and on February 25, 2011, a jury convicted him of all three charges and answered "yes" on two special verdict forms asking if Boysen was armed with a firearm at the time he committed the assaults. CP 90-94.

On March 7, 2011, the trial court sentenced Boysen to a total of 114 months confinement—42 months on the three felonies, plus 72 months consecutive for the two firearm enhancements. CP 96-105. Boysen timely filed this appeal. CP 106-117.

The Removal of Juror No. 26

During jury selection, the following exchange took place between the prosecutor and Juror No. 26:

> Prosecutor: [W]e hope that we have touched on the topics that may be hot-button items for folks, but we don't always know . . . [S]o I like to ask folks if there's anything that we haven't asked you about, we haven't talked to you about, we haven't brought up the subject. Or maybe we did, but it was off a little bit from exactly what you're sitting there thinking about, but you're thinking to yourself, should I raise my hand and tell them about this? . . . If you're sitting there, asking yourself that question or having those kinds of

thoughts, please raise your hand and tell us what it is. Nine times out of ten, it's the same thing, oh, well, thank you for telling us about that. Is there anything about that that would interfere with your ability to be fair and impartial? No, there isn't. And we can move on. But, from time to time, they say, no, it's not something—you know, now that we're talking about it, I really don't think I can set it aside. Has anybody got anything like that going on? Number 26.

Juror No. 26: I have a nephew that's been convicted and serving—

The Court: I need you to speak up.

Juror No. 26: I have a nephew who has been convicted and serving like in Spokane, and now he's been transferred to Aberdeen.

Prosecutor: Okay. And, again, that's something that you've brought up as I ask that question, and so it's something that you're thinking about, and so I need to inquire if there's anything about that that would interfere with your ability to be fair and impartial in this case?

Juror No. 26: ***Possibly***.

Prosecutor: Yeah. What do you think?

Juror No. 26: Well, the closeness of it, it was a traumatic experience. It was a family member.

Prosecutor: And so that trauma, that emotional experience, is ***interfering with your ability to be fair and impartial here***?

Juror No. 26: ***Yes***.

RP 52-53 (emphasis supplied).[1] Juror No. 26 was not asked any additional questions by either party or by the Court regarding the details of her cousin's conviction, what about that situation made her feel that her impartiality might be affected, or whether she could put those feelings aside and follow the court's instructions.

Later, outside the presence of the jury, the trial court *sua sponte* brought up Juror No. 26:

The Court: Number 26, do counsel wish to argue about number 26?

Defense: No, Your Honor.

The Court: She indicated that her nephew was convicted recently, and my notes indicate that she was concerned about whether or not she could be fair.

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[1] "RP ___" refers to the verbatim report of proceedings for the trial. "RP ___ (3/7/11)" refers to the report of proceedings from the sentencing hearing.

Prosecutor: Yes, Your Honor, she did state that. I did question her at some length, and she indicated that that would be a problem, so I'd ask you to dismiss her for cause.

The Court: Any objection?

Defense: We object, Your Honor.

The Court: You object to the dismissal of Number 26?

Defense: Yes, Your Honor.

The Court: Do you wish to put anything on the record with regard to your objection?

Defense: I do not, Your Honor.

The Court: Number 26 is dismissed.

RP 89-90.

Overview of the Evidence at Trial

On October 31, 2010, at about 8:00 p.m., Margaret Eldridge and Donald Palmer were traveling in Palmer's truck on Highway 101 in Thurston County. Palmer was driving. RP 121, 146-47.

The two became involved in an altercation with another vehicle, a gray pick-up truck with two people in it. RP 121-23,

142-44, 147-49, 163-66. At one point when they passed the gray truck, Eldridge heard "what sounded like somebody throwing a handful of rocks" at Palmer's truck. RP 123, 134. Palmer thought the sounds were gunshots. RP 123, 149. A short while later the gray truck exited Highway 101. At that point Eldridge saw the driver of the gray truck point a gun out the window and fire three shots. RP 124, 135-37. Palmer also saw muzzle flashes from the driver's side window of the gray truck. RP 159. Neither Palmer nor Eldridge saw the passenger in the gray truck do anything. RP 141, 159.

Eldridge and Palmer later found three bullet holes in Palmer's truck. RP 138, 150.

Shortly after the incident police pulled over a truck matching the description and plate number given by Eldridge when she called 911. RP 173-74. Chad Parker was the driver; Reed Boysen was the passenger. RP 176, 190, 194-95. Immediately after the arrest Eldridge identified Chad Parker as

the driver of the gray truck. Neither Eldridge nor Palmer identified Boysen. RP 232, 252-54.

Police recovered a semiautomatic handgun from Boysen. RP 193-94. Boysen had a permit for the weapon. RP 206, 328. Police also obtained a search warrant for the gray truck. RP 377. In it they recovered a .22 caliber revolver containing three live rounds and three expended cartridges. RP 378. No expended semi-automatic shell casings were recovered or admitted into evidence.

Two to three months prior to the incident, Boysen had been in a "horrible" motorcycle accident in which his arms and shoulder had been badly injured. RP 231, 327-28. Boysen's injuries made it difficult for him to drive, or even to lift his hands up. RP 327. His injuries and his difficulties in moving his arms were "obvious" to police at the time of his arrest. RP 388.

Chad Parker testified for the State pursuant to a plea agreement which is described more fully in the next section.

Parker admitted to driving the gray truck that was involved in the incident, and to firing three shots at Palmer's vehicle with the .22 caliber revolver. RP 311-14. Parker also claimed that Boysen had fired three shots from his own weapon by reaching his arm out of the passenger window and firing across the hood of the gray truck. RP 315-16.

Parker admitted that immediately after his arrest he had lied to the police regarding his involvement. RP 337. He told police that he had only fired in the air, and that he had done so using Boysen's gun. RP 337-41. Parker told the police that the three expended shells in his revolver were the result of his shooting at a chipmunk the day before. RP 341-42.

The Curtailment of the Defense Cross-Examination of Chad Parker

In exchange for his testimony against Boysen, co-defendant Chad Parker was allowed to plead guilty to two counts of second degree assault. The charge of drive-by shooting and both firearm enhancements were dismissed. RP

236-37, 243. As a result of this deal, Parker faced a standard range of 12+ - 14 months confinement at his sentencing.[2] By contrast, after being convicted of all three charges plus the two firearm enhancements, Boysen faced a total standard range of 108-120 months in prison. CP 97. In other words, as a result of the deal struck by Parker, the *high* end of his standard range was nearly *eight times* less than the *low* end of Boysen's range. Put another way, Parker saved himself a minimum of 7.8 years in prison by agreeing to cooperate with the prosecution and testify against Boysen.

The State moved to preclude the defense from cross-examining Parker regarding the specifics of this dramatic disparity. RP 236-38. The defense opposed the motion, arguing that the specific benefit Parker expected to receive from

[2] Like Boysen, Parker had no prior criminal history, so his sentencing exposure had he been convicted of all charges would have been the same as Boysen's. RP 242-43. As it turned out, Parker was sentenced to 14 months. Parker's judgment and sentence is filed under Thurston County Superior Court case number 10-1-01653-1.

his testimony was relevant to show his bias. RP 239-40, 244-45. The Court granted the State's motion:

> I believe it is appropriate that one can speak generally about a difference in sentence without talking about specific months and the number of months that the sentence—or years that the sentence would be because of the direct correlation between this co-defendant and the defendant on trial here. . . So that would be the Court's ruling.

RP 247.

As a result of the trial court's ruling, the defense was prohibited from cross-examining Parker regarding the specific—and extraordinary—sentencing benefits he received by agreeing to testify against Boysen. The court's ruling allowed Parker to significantly—and misleadingly—downplay those benefits during cross-examination:

Defense: As a result of this deal on the table, as a result of you coming in here and testifying for these good people, what are you now expecting to happen to you on this case?

Parker: ***I'm still going to prison, sir.***

* * *

Defense: [D]id you feel like [the plea bargain] was a good deal for you?

Parker: No.

Defense: You didn't?

Parker: ***I did not feel that my actions were just in the punishment, no.***

RP 323, 359-60 (emphasis supplied).

Vouching

At the very outset of Chad Parker's direct examination, the prosecutor asked Parker several questions about his plea deal. Then the prosecutor asked, ""Did you also enter into an agreement to truthfully testify?" Parker responded, "Yes, sir." RP 309. The defense did not object to either the question or the answer.

Sentencing

At sentencing Boysen's counsel argued that the two assaults and the drive-by shooting constituted the same criminal conduct. RP 5-6 (3/7/11). The trial court rejected the defense argument. RP 15.

IV. ARGUMENT

Boysen's Federal and State Constitutional Rights to Confront the Witnesses Against Him Were Violated When the Trial Court Curtailed Cross-Examination of Chad Parker, the State's Key Witness Against Boysen.

Introduction

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to be confronted with the witnesses against him. Similarly, Article 1, Section 22 of the Washington State Constitution guarantees the accused the right to meet the witnesses against him face to face.

At the heart of this constitutional right is the right to cross-examine adverse witnesses. *See generally Crawford v. Washington*, 541 U.S. 36 (2004). "Indeed, the main and essential purpose of confrontation is ***to secure for the opponent the opportunity of cross-examination.***" *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986), citing *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (quotations omitted) (emphasis in original).

But being afforded a mere opportunity to cross-examine witnesses is not enough to satisfy the right to confrontation. The scope of cross-examination permitted by the trial court must be sufficiently broad to allow for that confrontation to be meaningful and effective. Of particular importance to meaningful and effective cross-examination is the ability to fully explore the witness's bias:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. ***The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.***

Davis, 415 U.S. at 316-17 (quotations and citations omitted) (emphasis supplied).

The trial court has no obligation to protect a witness from vigorous and effective cross-examination, short of insuring that the examination remains within certain broad boundaries:

> No obligation is imposed on the court . . . to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.

Davis, 415 U.S. at 320, quoting *Alford v. United States*, 282 U.S. 687, 694 (1931).

Accordingly,

> a criminal defendant states a violation of the Confrontation Clause by showing that ***he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness***, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.

Olden v. Kentucky, 488 U.S. 227, 231 (1988), citing *Van Arsdall*, 475 U.S. at 680, and *Davis*, 415 U.S. at 318 (quotations omitted) (emphasis supplied).

Boysen's Right to Confrontation Was Violated.

Here, the trial court prevented Boysen from exposing the magnitude of the benefit Parker received from the State in exchange for his testimony. The reality was that by agreeing to

testify against Boysen, Parker reduced his maximum exposure to 14 months confinement, while saving himself a *minimum* of 94 months (7.8 years) in prison. All the jury heard, however, was that Parker was "still going to prison," and that he didn't feel the punishment he faced as a result of the deal he made with the State was "just." RP 323, 360.

Boysen's case is markedly similar to *State v. Portnoy*, 43 Wash. App. 455, 718 P.2d 805, *rev. denied*, 106 Wash.2d 1013 (1986). In *Portnoy*, two defendants were charged with two counts of second degree assault with deadly weapon enhancements. Portnoy's co-defendant—coincidentally named Parker—pled guilty to one count of attempted second degree assault with no deadly weapon enhancement in exchange for his testimony against Portnoy. The trial court prohibited Portnoy from cross-examining Parker regarding the mandatory prison sentence associated with the weapon enhancements he had avoided. *Portnoy*, 43 Wash. App. at 458-59. The trial court accepted the State's reasoning—identical to the reasoning the State proffered and the trial court adopted in

this case—that exposure of the specific sentence Parker had avoided should be kept from the jury because "a jury should have no knowledge about the sentence to which a conviction might lead." *Id.* at 460.

The Court of Appeals in *Portnoy* flatly rejected the position advanced by the State. In other words, a Division of this Court has already rejected the identical reasoning Boysen's trial court used to support its restriction on cross-examination in this case:

> [W]e are referred to, and find, no authority suggesting that the State has the right to keep from the jury the extent of the punishment the defendant will face if found guilty, ***assuming that information is otherwise relevant.***
>
> First, the preventive instruction of WPIC 1.02 is always available. Second, ***Washington protects the right to full cross examination into the extent of a plea bargain and the motives for a guilty plea when an accomplice or co-defendant testifies for the state.***
>
> ***The right of cross-examination allows more than the asking of general questions concerning bias; it guarantees an opportunity to show specific reasons why a co-defendant witness might be biased in a particular case.***
>
> Such cross examination is the price the State must pay for admission of a co-defendant's testimony to that plea.

> ***The jury needs to have full information about the witness's guilty plea in order to intelligently evaluate his testimony about the crimes allegedly committed with the defendant.*** Unfair prejudice is avoided by this opportunity for full cross-examination. The trial court therefore erred in forbidding that cross-examination.
>
> Further, such an error is of constitutional magnitude because it infringes upon the defendant's Sixth Amendment right to confront witnesses testifying against him. This error requires reversal unless it has been shown to have been harmless beyond a reasonable doubt.

Id. at 461-62 (quotations and citations omitted) (plain italics in original; bold italics supplied); *see also State v. Roberts*, 25 Wash. App. 830, 834-36, 611 P.2d 1297 (1980) (reversing rape and kidnapping convictions where trial court curtailed defense cross-examination of complaining witness regarding facts tending to show that the witness was under pressure to cooperate with the prosecutor's office).

Portnoy is not alone in its reasoning. A situation similar to Portnoy's—and Boysen's—arose in *United States v. Chandler*, 326 F.3d 210 (3rd Cir. 2003). In *Chandler*, the defendant was charged with conspiracy to distribute cocaine.

At trial, two of Chandler's alleged co-conspirators—named Sylvester and Yearwood—testified against Chandler pursuant to a cooperation agreement with the government. Chandler's counsel cross-examined both witnesses regarding their cooperation agreements and the sentences they received or hoped to receive as a result of those agreements, but was prevented from exploring the potential terms of imprisonment they avoided by cooperating with the prosecution. *Chandler*, 326 F.3d at 216-18.

In the case of witness Sylvester, the jury learned that he pled guilty to a sentence range of 12-18 months in prison, but that he only served one month on house arrest. What the jury was not allowed to hear, however, was that absent his cooperation agreement Sylvester faced a potential sentence of 97-121 months in prison. *Id.* at 216-17, 221-22. Similarly, Chandler's counsel was prohibited from cross-examining Yearwood about her understanding of her potential sentencing

exposure in the absence of the cooperation agreement. *Id.* at 217-18.

The Third Circuit Court of Appeals held that the truncation of Chandler's cross-examination of the two cooperating witnesses violated Chandler's right to confrontation. The Court noted that it is particularly important for a criminal defendant to fully cross-examine cooperating witnesses regarding bias:

> With respect to the cross-examination of cooperating witnesses who expect to obtain, or have obtained, a benefit from the government in exchange for their testimony, ***the critical question is whether the defendant is allowed an opportunity to examine a witness['s] subjective understanding of his bargain with the government, for it is this understanding which is of probative value on the issue of bias.***

Id. at 220 (quotations omitted) (emphasis supplied).

The Court went on to explain:

> [W]e have little difficulty concluding that a reasonable jury could have reached a significantly different impression of Sylvester's and Yearwood's credibility ***had it been apprised of the enormous magnitude of their stake in testifying against Chandler***. With respect to Sylvester, the jury learned only that he pled guilty to an

> offense carrying a sentence of between 12 and 18 months, that he could have been charged with a greater offense, and that he received only one month of house arrest, plus probation. ***The jury would have had little reason to infer from that information that Sylvester's cooperation with the government might have meant the difference between more than eight years in prison, on the one hand, and the modest sentence he in fact received, on the other. The limited nature of Sylvester's acknowledgment that he had benefitted from his cooperation made that acknowledgment insufficient for a jury to appreciate the strength of his incentive to provide testimony that was satisfactory to the prosecution.*** Similarly, if Yearwood, facing a sentence under the Guidelines of upwards of twelve years, anticipated a benefit equal to even a fraction of Sylvester's proportionate penalty reduction, her mere acknowledgment that she hoped that the government would move for a lesser sentence did not adequately enable a jury to evaluate her motive to cooperate.

Id. at 222 (quotations omitted) (emphasis supplied).

Moreover, just as in *Portnoy*, the *Chandler* Court rejected the government's contention—again, identical to the argument advanced by the State and adopted by the trial court in Boysen's case—that curtailment of cross-examination was necessary to prevent the jury from inferring the potential punishment faced by the defendant if convicted:

> We conclude that, while the government had a valid interest in keeping from the jury information from which it might infer Chandler's prospective sentence were she to be convicted, ***that interest did not trump Chandler's entitlement under the Confrontation Clause. That interest, like the state's interest [in Davis v. Alaska] in protecting the anonymity of juvenile offenders, had to yield to Chandler's constitutional right to probe the possible biases, prejudices, or ulterior motives of the witnesses against her.***

Id. at 223 (quotations omitted) (emphasis supplied).

Numerous other federal courts have followed the Supreme Court's lead in *Van Arsdall* in zealously protecting a defendant's right to meaningful and effective confrontation. *See, e.g.*, *Slovik v. Yates*, 556 F.3d 747 (9th Cir. 2009) (granting habeas relief where defense was prevented from impeaching prosecution witness regarding the fact that witness was on probation); *Holley v. Yarborough*, 568 F.3d 1091 (9th Cir. 2009) (granting habeas relief where defense in child sexual abuse case was prevented from cross-examining alleged victim regarding prior statements she had made which tended to show a familiarity with sexual behavior and an active sexual

imagination); *Brinson v. Walker*, 547 F.3d 387 (2nd Cir. 2008) (granting habeas relief where African-American defendant identified by alleged robbery victim was prohibited from cross-examining alleged victim regarding his hatred of black people); *Hoover v. Maryland*, 714 F.2d 301 (4th Cir. 1983) (granting habeas relief in murder case where defense was prevented from cross-examining cooperating witness regarding the details of his immunity agreement with the prosecution); *United States v. Jimenez*, 464 F.3d 555 (5th Cir. 2006) (reversing drug convictions where defense was prevented from cross-examining police officer regarding the location from which he surveilled defendant's home); *Vasquez v. Jones*, 496 F.3d 564 (6th Cir. 2007) (granting habeas relief where homicide defendant was prevented from using prior convictions of absent hearsay declarant to impeach declarant's prior testimony); *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009) (reversing firearm conviction where defendant was prohibited from cross-examining informant regarding his mental health history).

In short, the overwhelming weight of authority clearly establishes that the trial court violated Boysen's right to confrontation when it truncated his cross-examination of Chad Parker.

The Error Was Not Harmless Beyond a Reasonable Doubt.

When a defendant's right to confrontation has been violated, he is entitled to a new trial unless the State can demonstrate beyond a reasonable doubt that the error was harmless. *Van Arsdall*, 475 U.S. at 684.

> The correct inquiry is whether, ***assuming that the damaging potential of the cross-examination were fully realized***, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include ***the importance of the witness' testimony*** in the prosecution's case, ***whether the testimony was cumulative***, the ***presence or absence of evidence corroborating or contradicting the testimony of the witness on material points***, the ***extent of cross-examination otherwise permitted***, and, of course, the ***overall strength of the prosecution's case***.

Id (emphasis supplied).

Applying the *Van Arsdall* factors to this case, it is evident that the State cannot meet its heavy burden of demonstrating harmlessness.

First, Chad Parker's testimony was critical to the State's case; without him, no one identified Boysen as firing any shots during the incident. Obviously, the more central a witness's credibility to the State's case, the more imperative it is that his credibility be fully explored through cross-examination. Second, (and similarly), Parker's testimony was not cumulative on the issue of identification of Boysen as a shooter. Rather, Parker's testimony was the *only* evidence that Boysen fired his weapon. Third, evidence of Boysen's prior injuries—some of which came from Parker's own testimony—contradicted Parker's description of how Boysen leaned out the window and fired. Fourth, the limitation imposed on Boysen's cross-examination of Parker involved facts—the eight years in prison which Parker saved himself by testifying for the State—which were arguably *the* key determinants of Parker's credibility.

And finally, while the State's case against Parker was very strong indeed, its case against Boysen was decidedly less so. In fact, without Parker the State likely could not have proceeded against Boysen at all.

For all of these reasons, the State cannot prove that the trial court's violation of Boysen's confrontation rights was harmless beyond a reasonable doubt. This Court should reverse the convictions and remand for a new trial.

The Prosecutor Committed Flagrant and Ill-Intentioned Misconduct When He Improperly Vouched for Chad Parker's Credibility. Defense Counsel Was Constitutionally Ineffective in Failing to Object to the Misconduct.

Asking Parker Whether His Plea Deal Required Him to Testify Truthfully Was Improper Vouching.

More than four months before Boysen's trial began, the Washington Supreme Court held that it is misconduct for the State to elicit during direct examination of a cooperating witness that the witness's agreement with the State requires "truthful" testimony. *State v. Ish*, 170 Wash.2d 189, 190, 241 P.3d 389 (2010). The Court reasoned:

A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation. . .

Presumably, prosecutors know that the contents of an agreement made in exchange for testimony may become an exhibit or the subject of testimony at trial, and there is a natural temptation to insert self-serving language into these agreements. Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving, irrelevant, and may amount to vouching, particularly if admitted during the State's case in chief. Prosecutorial remarks implying that the government is motivating the witness to testify truthfully are prosecutorial overkill. We agree with the court's conclusion in [*State v.*] *Green*[, 119 Wash. App. 15, 79 P.3d 460 (2003),] that evidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief. Evidence is not admissible merely because it is contained in an agreement, and reference to irrelevant or prejudicial matters should be excluded or redacted.

Ish, 170 Wash.2d at 197-98 (quotations and most citations omitted).

When the prosecutor elicited on direct examination Chad Parker's agreement to testify "truthfully", he committed misconduct in a manner virtually identical to what occurred in *Ish*. The only real question before the Court—as in *Ish*—is whether Boysen was sufficiently prejudiced by the misconduct to merit a new trial.

The Misconduct Was Flagrant and Ill-Intentioned.

Boysen's trial counsel did not object to the improper vouching. Accordingly, reversal is only warranted if "the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Weber*, 159 Wash.2d 252, 270, 149 P.3d 646 (2006) (quotations omitted).

Ish was decided on October 7, 2010. The misconduct here occurred on February 23, 2011—over four months after *Ish* clearly announced that the type of question asked by the

prosecutor was impermissible. A lawyer is presumed to know the law. *See State v. Carter*, 56 Wash. App. 217, 224, 783 P.2d 589 (1989) (lawyer is presumed to know rules of the court). Indeed, commission of misconduct in the face of clearly governing precedent is by itself a sufficient basis for the reviewing Court to conclude that the misconduct was flagrant and ill-intentioned. *See State v. Fleming*, 83 Wash. App. 209, 214, 921 P.2d 1076 (1996), *rev. denied*, 131 Wash.2d 1018 (1997) ("We note that this improper argument was made over two years after the opinion in [the controlling precedent]. We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.").

There is simply no excuse for the trial prosecutor's eliciting the "truthfulness" provision of the plea agreement in light of *Ish*. The only reasonable conclusion is that the prosecutor intentionally elected to do in spite of *Ish*. Such a

tactic cannot be characterized as anything but flagrant and ill-intentioned.[3]

Moreover, as discussed above, Parker's testimony—and consequently his credibility—was critical to the State's case. By implying that Parker was being compelled to tell the truth because of his agreement with the prosecution, the State intentionally bolstered and vouched for the credibility of a witness whose reliability would otherwise have been very suspect. This Court should reverse and remand for a new trial.

Even if the Misconduct Was Not Flagrant and Ill-Intentioned, Reversal is Required Because Defense Counsel Was Constitutionally Ineffective in Failing to Object to the Misconduct.

Effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that trial

[3] *But cf. State v. Smith*, ___ Wash. App. ___, 256 P.3d 449 (2011) (finding similar prosecutorial conduct was not flagrant and ill-intentioned). However, the *Smith* decision now appears on Westlaw with the notation "withdrawn from bound volume." It is unclear if *Smith* may still be considered a published opinion at this point.

counsel's representation was constitutionally inadequate, Boysen must show that counsel's performance was deficient—*i.e.*, that it fell below an objective standard of reasonableness—and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687-88. The proper measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688. In order to demonstrate prejudice arising from counsel's deficient performance, Boysen must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The "reasonable probability" standard is not stringent, and requires a showing by less than a preponderance of the evidence that the outcome of the proceeding would have been different had the claimant's rights not been violated. *See, e.g.*, *Pirtle v. Morgan*, 313 F.3d

1160, 1172 (9th Cir. 2002), *cert. denied*, 539 U.S. 916 (2003), quoting *Strickland*, 466 U.S. at 694:

> A "reasonable probability" is less than a preponderance: "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

Failure to lodge an appropriate objection constitutes deficient performance if there was no discernible tactical reason for the failure to object. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78, 917 P.2d 563 (1996) (deficient performance for cousel to fail to object inadmissible of evidence of defendant's prior convictions; "[W]e cannot discern a reason why Hendrickson's counsel would not have objected to such damaging and prejudicial evidence.").

Here, Boysen's trial counsel failed to object to evidence introduced in the State's case-in-chief which was both obviously harmful and clearly inadmissible. This was deficient performance. Further, for the reasons already discussed regarding the critical importance of Parker's testimony, there is

at least a reasonable probability that the result of the proceeding would have been different had the prosecutor's improper vouching been prevented in the first instance.

This Court should reverse and remand for a new trial.

The Trial Court Abused Its Discretion When It Excused Juror No. 26 for Cause, Thereby Violating Boysen's Federal and State Constitutional Rights to an Impartial Jury.

Both the Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington Constitution guarantee a criminal defendant the right to trial by an impartial jury.

In the process of selecting a jury, challenges for cause are governed by CrR 6.4 and RCW 4.44.170 *et. seq.* A trial court may dismiss a juror for "actual bias" if the court is satisfied "that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). It is not enough that the prospective juror may have "formed or expressed an opinion" about the case; in order for the court to dismiss the juror for

actual bias, it must be established "that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190. "[E]quivocal answers alone do not require a juror to be removed when challenged for cause, rather, the question is whether a juror with preconceived ideas can set them aside. *State v. Noltie*, 116 Wash.2d 831, 839, 809 P.2d 190 (1991).

If the non-challenging party objects to the trial court's determination of actual bias, "the court shall try the issue and determine the law and the facts." CrR 6.4(d)(1); *see also* RCW 4.44.230. Put simply, excusal for actual bias requires actual proof. *Noltie*, 116 Wash.2d at 838.

The trial court's ruling on a challenge for cause is reviewed for an abuse of discretion. *State v. Gonzalez*, 111 Wash. App. 276, 278, 45 P.3d 205 (2002), *rev. denied*, 148 Wash.2d 1012 (2003). An abuse of discretion occurs

> when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts

> unsupported in the record or was reached by applying the wrong legal standard.

State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (citations omitted).

Here, it is impossible to tell what legal standard the trial court applied because the court never mentioned any legal standard. Similarly, since the trial court never articulated the facts upon which its decision was based, it is impossible to tell whether those facts are supported by the record. What is clear, however, is that application of the correct legal standard to the very few statements made by Juror No. 26 leads to the inescapable conclusion that she should never been excused for cause.

Juror No. 26 stated that she had a nephew who had been convicted of an unnamed crime and who was currently serving time for that crime. She said that it was a traumatic experience for her because it involved a close family member. When the prosecutor asked her if the experience would "interfere with

[her] ability to be fair and impartial in this case," the juror responded, "possibly." RP 53. The prosecutor asked again, this time in a leading manner:

Prosecutor: And so that trauma, that emotional experience, is interfering with your ability to be fair and impartial here?

Juror No. 26: Yes.

RP 52-53 (emphasis supplied).

The juror never said that she could not be impartial. At most she equivocated that her nephew's experience with the criminal justice system *may interfere or was interfering* with her ability to remain impartial. This is simply not the stuff from which challenges for cause are made.

To further illustrate the trial court's error, it is instructive to examine the altogether different standard the court applied to a defense challenge for cause. Juror No. 27 unequivocally stated, "I don't like guns. I don't feel people should have guns unless they're in law enforcement and carry it, or sportsman hunting." RP 68. Later she bluntly stated, "I don't believe

[Boysen] should have had [a gun]." RP 69. Nevertheless, the juror stated that she would "try" to keep an open mind." RP 68-69.

When the defense challenged Juror No. 27 for cause, both the State and the trial court took a very different tone than had been the case with Juror No. 26:

> Prosecutor: Your Honor, I believe [Juror No. 27] stated what several of them stated, and that is that they would be [sic] do their best to be fair and impartial. She gave honest answers to questions. I think, ***unless she says she could not be fair and impartial or cannot set that aside, I think that she should remain on the panel.***
>
> The Court: The Court is denying the motion at this time. . .

RP 91 (emphasis supplied).[4]

Juror No. 26's brief and equivocal statements about her ability to remain impartial did not provide a factual or legal

[4] To be clear, Boysen, does not argue that Juror No. 27 should have been excused for cause. Rather, he contends that had the trial court applied the same standard to Jurors No. 26 and 27, both would have remained on the panel.

basis for the trial court to excuse her over the defense's objection. The court abused its discretion by doing so.

"When a defendant is denied his or her constitutional right to a fair and impartial jury, the remedy is reversal." *Gonzalez*, 111 Wash. App. at 282. This Court should reverse Boysen's convictions and order a new trial.

The Convictions for Second Degree Assault and Drive-By Shooting Violate Double Jeopardy. The Appropriate Remedy Is to Vacate the Assault Convictions and Remand the Drive-By Shooting Count for Re-sentencing.

Introduction

The double jeopardy clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, Article One, Section 9 of the Washington Constitution states: "No person shall . . . be twice put in jeopardy for the same offense." These federal and state provisions afford parallel protection against the "prosecution oppression" which arises from multiple punishments. *State v. Womac*, 160 Wash.2d 643, 650, 160 P.3d 40 (2007).

The federal and state double jeopardy clauses prohibit:

> (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.

Womac, 160 Wash.2d at 650-51, quoting *In Re PRP of Percer*, 150 Wash.2d 41, 48-49, 75 P.3d 488 (2003). It is the third of these prohibitions—the rule that protects all of us from the imposition of multiple punishments for the same offense—which is implicated in Boysen's case.

It is of no consequence if the sentences for the offending charges are imposed concurrently. Because a conviction itself "constitutes punishment"—"even without imposition of sentence"— "convictions *may not stand* for all offenses where double jeopardy protections are violated." *Womac*, 160 Wash.2d at 657-58 (emphasis in original), quoting *State v. Calle*, 125 Wash.2d 769, 777 n.3, 888 P.2d 155 (1995).

In analyzing a potential "multiple punishment" double jeopardy violation, a reviewing court's overarching goal is to

determine whether the legislature intended to prescribe separate punishments for the offenses at issue. *State v. Freeman*, 153 Wash.2d 765, 770-72, 108 P.3d 753 (2005); *In Re PRP of Francis*, 170 Wash.2d 517, 523, 242 P.3d 866 (2010). To make this determination, our state Supreme Court examines a set of four factors in the context of both the charged criminal statutes and the specific facts underlying those charges.

First, the Court "consider[s] any express or implicit legislative intent." *Freeman*, 153 Wash.2d at 771-72. One example of explicit legislative intent is found in the "anti-merger" statute, which permits the State to prosecute a defendant for burglary *and* for the underlying crime the alleged burglar intended to commit. *See* RCW 9A.52.050; *Freeman*, 153 Wash.2d at 772.

Second, in the absence of clear legislative intent regarding the imposition of multiple punishments, the Court will look to the *Blockburger* test, also called the "same evidence" or "same elements" test. *Freeman*, 153 Wash.2d at

772, citing *Blockburger v. United States*, 284 U.S. 299 (1932). The rule, put simply, states:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

In Re PRP of Orange, 152 Wash.2d 795, 817, 100 P.3d 291 (2005), quoting *Blockburger*, 284 U.S. at 304. "If each crime contains an element that the other does not, [the Court] presume[s] that the crimes are not the same for double jeopardy purposes." *Freeman*, 153 Wash.2d at 772. The Court must "consider the elements of the crimes *as charged and proved*, not merely as the level of an abstract articulation of the elements." *Freeman*, 153 Wash.2d at 777 (emphasis supplied); *see also Francis*, 170 Wash.2d at 523-24.

It is important to note, however, that the *Blockburger* test creates only a rebuttable presumption; punishment for two offenses may still violate double jeopardy even if those offenses fail the "same elements" test. *Freeman*, 153 Wash.2d at 776-80

(holding that first degree robbery and second degree assault are generally the same offense for double jeopardy purposes even though they fail the "same elements" test) ; *Womac*, 160 Wash.2d at 652 (double jeopardy may be violated "*despite* a determination that the offenses involved clearly contained different legal elements") (emphasis in original).

A third tool for determining whether multiple punishments violate double jeopardy is application of the "merger doctrine."

> Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.

Freeman, 153 Wash.2d at 772-73.

Fourth and finally, crimes which appear to be the same offense for double jeopardy purposes may nevertheless be punished separately "if there is an independent purpose or effect" to each crime. *Freeman*, 153 Wash.2d at 773.

If the Court determines that double jeopardy has been violated, the proper remedy is to vacate "the conviction for the crime that forms part of the proof of the other. This is because the greater offense typically carries a penalty that incorporates punishment for the lesser included offense." *Freeman*, 153 Wash.2d at 775 (quotations and citations omitted).

As Charged and Proven in this Case, Second Degree Assault and Drive-By Shooting Are the Same Offense for Double Jeopardy Purposes.

Second degree assault and drive-by shooting are both codified in RCW Chapter 9A.36, entitled "Assault—physical harm." Apart from their being grouped in the same category of offenses, there is no express or implied legislative intent regarding whether the same conduct can be punished separately under both statutes.

Boysen does not contend that the elements of assault and drive-by shooting are the same—they clearly are not. Rather, he asserts that as charged and proven in this case the crimes are identical. The act of shooting from the moving vehicle formed

the basis for both the assaults and the drive-by shooting. Moreover, it was the firearm alleged to have been used in the drive-by shooting that elevated the assaults from fourth degree to second degree. *See* CP 35-36. Nor was there any independent purpose or effect to the crimes.

On the facts of this case, convictions for both second degree assault and drive-by shooting violate double jeopardy. The proper remedy is to vacate the conviction for the "lesser" crime—which in this case is the drive-by shooting—and remand for re-sentencing on the assaults.[5]

[5] Boysen is mindful that Division Three of this Court has reached the opposite conclusion regarding the crimes of first degree assault and drive-by shooting in three cases decided on the same day: *State v. Larson*, 160 Wash. App. 577, 249 P.3d 669, *rev. denied*, 172 Wash.2d 1002 (2011); *State v. Gassman*, 160 Wash. App. 600, 248 P.3d 155, *rev. denied*, 172 Wash.2d 1002 (2011); and *State v. Statler*, 160 Wash. App. 622, 248 P.3d 165, *rev. denied*, 172 Wash.2d 1002 (2011). Boysen urges this Court to reject the reasoning of Division Three and to chart its own path on this issue.

The Trial Court Erred When It Rejected the Defense Contention that for Sentencing Purposes the Drive-By Shooting Constituted the Same Criminal Conduct as the Two Second Degree Assault Charges.

Crimes constitute the "same criminal conduct" for sentencing purposes if they involved the same victim, occurred at the same time and place, and involved the same criminal intent. RCW 9.94A.589(1)(a). Whether crimes encompass the same criminal intent "can be measured by determining whether one crime furthered the other." *In Re PRP of Connick*, 144 Wash.2d 442, 465, 28 P.3d 729 (2001).

Here, the assaults and the drive-by shooting clearly occurred at the same time and place.

Next, the victims of the assaults were Donald Palmer and Margaret Eldridge, the occupants of the other vehicle. *See* CP 79-80. Meanwhile, on the drive-by shooting count, Jury Instruction No. 23 required the State to prove that Boysen created a risk of death or serious injury to "another person." CP 86. In closing the State argued that the victims of the drive-by shooting were Palmer, Eldridge, and other members of "the

public in general." RP 451. In other words, Palmer and Eldridge were both victims of the drive-by shooting, along with other, hypothetical, unnamed victims.

Lastly, the assaults and drive-by shooting involved the same objective criminal intent in that shooting from the moving vehicle furthered the overarching criminal purpose—to intimidate the occupants of the other vehicle.

On the facts of this case, the assaults and the drive-by shooting constituted the same criminal conduct. This Court should remand for resentencing.

V. CONCLUSION

For the foregoing reasons, this Court should reverse Boysen's convictions and remand for a new trial. Alternatively, the court should vacate the judgment and remand for re-sentencing.

DATED this 10th day of October, 2011.

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CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on October 10, 2011, I served a copy of the attached brief on counsel for the State of Washington and on the appellant by causing the same to be mailed, first-class postage prepaid, to:

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